



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO. 160 OF 2016**

**MODE OF TRACK.....FAST TRACK**

**ESTHER NANJALA NDALILA.....PLAINTIFF**

**VERSUS**

**PATRICK WAFULA KATI .....1<sup>ST</sup> DEFENDANT**

**JOSEPH WAFULA KATI.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 16<sup>th</sup> December 2016 the plaintiff herein (**ESTHER NANJALA NDALILA**) filed this suit against the defendants (**PATRICK WAFULA KATI** - 1st defendant and **JOSEPH WAFULA KATI** – 2<sup>nd</sup> defendant) seeking the main prayer that the two be evicted from **PLOT NO. 7 SIKOSI MARKET** for having illegally invaded and developed it whereas it belongs to the Plaintiff.

The record shows that upon receipt of the affidavit of service dated 10<sup>th</sup> January 2017 by one **CALEB SASITA** a Process Server of this Court, the Deputy Registrar proceeded to enter interlocutory Judgment against the defendants on 22<sup>nd</sup> February 2017. Thereafter and pursuant to that interlocutory Judgment, the case was listed for formal proof before **MUKUNYA J** on 27<sup>th</sup> September 2017 and after hearing the Plaintiff, Judgment was entered for the Plaintiff as prayed on 10<sup>th</sup> January 2018.

I now have before me the defendant's Notice of Motion dated 26<sup>th</sup> July 2018 premised under the provisions of **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Rules, Article 159(2) (d) of the constitution and Order 10 Rule 11 of the Civil Procedure Rules** seeking the following orders:-

1. Spent
2. That the Honourable Court be pleased to set aside the interlocutory Judgment against the defendants entered on the 14<sup>th</sup> February 2017 and all consequential orders pursuant thereto.
3. That the defendants be granted leave to file defence out of time.
4. That the draft defence and counter – claim annexed on the Supporting Affidavit herein be deemed as properly on record after payment of the requisite Court fees.
5. That costs of this application be provided for.

The application is premised on the grounds set out therein and is also supported by the affidavit of the 1<sup>st</sup> defendant.

The gravamen of the application is that the defendants were not served with the Complaint and Summons to Enter Appearance and that they have been in occupation of the suit plot. Further, that they have a good defence and counter-claim with high chances of success and should be accorded a chance to be heard since they only knew about the Judgment when they were called by the Police and were ordered to vacate or be evicted.

The application is contested and in a Replying Affidavit dated 25<sup>th</sup> September 2018, the Plaintiff has deponed, inter alia, that the application is incompetent, bad in law and an abuse of the Court process as the defendant's were duly served with Summons to Enter Appearance by one **CALEB SASITA** and acknowledged service by signing. Thereafter, the case proceeded to hearing and a Judgment was entered in her favour on 10<sup>th</sup> January 2018 and this application is an attempt by the defendants to deny her the fruits of the Judgment since the defendants

know that the Plaintiff purchased the suit plot from their late father **NICHOLAS KATTI**. That the defendants lack the locus standi to file any counter-claim and the defence raised no triable issues and in any event, the suit plot is now registered in her names.

In a Supplementary Affidavit dated 18<sup>th</sup> October 2018, the 1<sup>st</sup> defendant denied having signed the Summons of service or that he knows **CALEB SASITA**. He denied that the Plaintiff bought the suit plot from his deceased father adding that in fact it was bought from his step mother one **ANN KATTI** and the defendants are the ones in occupation. He added that even though the suit plot is in the names of the Plaintiff, that registration was obtained fraudulently.

In a further Affidavit dated 24<sup>th</sup> October 2018, the Plaintiff deposed that it is preposterous for the defendants to deny service upon them when there is an affidavit of service by one **CALEB SASITA** to that effect. She added that she purchased the suit plot from **NICHOLAS KATTI** on 18<sup>th</sup> December 2011 as per copy of the Sale Agreement and paid him Kshs. 100,000/= and only the balance of the purchase price was paid to his wife **ANN KATTI** the defendant's step mother. A copy of the agreement is annexed. That the registration of the suit plot in her names was above board yet the defendants continue to defiantly occupy the same.

The application was canvassed by way of written submissions which have been filed by **MR WAMALWA SIMIYU ADVOCATE** for the defendants and **MR GIDEON RAGIRA ADVOCATE** for the plaintiff.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

The application herein seeks the setting aside of the ex-parte Judgment dated 10<sup>th</sup> January 2018. Setting aside of ex-parte Judgments is a daily occurrence in our Courts. The Court of Appeal discussed the criteria of setting aside ex-parte Judgments in the case of **JAMES KANYITA NDERITU & ANOTHER .V. MARIOS PHILOTAS GHIKAS & ANOTHER 2016 eKLR** and said:-

*“In a regular default Judgment, the defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default Judgment. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the Court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default Judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be, the length of time that has elapsed since the default Judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default Judgment, among others.”*

In **KINGSWAY TYRES AND AUTOMART .V. RAFIKI ENTRPRISES LTD C.A CIVIL APPEAL NO 220 OF 1995**. The Court held as follows with regard to the duty cast on a party that seeks the Courts discretion to set aside an ex-parte Judgment be exercised in his favour:-

*“To our minds, the onus was on the Respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that that the ex-parte Judgment was a regular Judgment. It would only, if at all, be properly vacated on grounds other than non-service of summons. There are ample authorities to the effect that notwithstanding regularity of it, a Court may set aside an ex-parte Judgment if a defendant shows he has a reasonable defence on the merits.”*

In the same **JAMES KANYITA NDERITU** case (supra) the Court of Appeal drew a distinction between a regular and irregular Judgment and said:-

*“In an irregular default Judgment, on the other hand, Judgment will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default Judgment is set aside ex-debito justitiae as a matter of right. The Court does not even have to be moved by the party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reasons why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.”*

In **SHAH .V. MBOGO & ANOTHER 1967 E.A 116**, the Court stated that

the discretion to set aside an ex-parte Judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice”

Finally, in **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A DUFFUS P** stated:-

*“The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean, in my view, a defence that must succeed. It means, as **SHERIDAN J** put it, “a triable issue” that is, an issue which raised a prima facie defence and which should go on trial for adjudication.” Emphasis added*

The principles that emerge from the above cases is that where the Judgment sought to be set aside is irregular in that there was no proper service upon the defendant, then the Court has no discretion in the matter. Such Judgment is set aside as a matter of course in order to up-

hold the rule that a party should not be condemned un-heard. But where the defendant was properly served with Summons, the resultant Judgment is a regular one. It may still be set aside on terms that are reasonable but in so doing, the Court will take into account the reasons why no defence was filed, the length of time that has lapsed since the Judgment was entered, whether there is a defence that raises triable issue, the prejudice that either party may suffer and also whether or not it is in the interest of justice to do so.

Guided by the above, there is no doubt in my mind that the ex-parte interlocutory Judgment entered against the defendants herein by the Deputy Registrar on 22<sup>nd</sup> February 2017 and therefore the final Judgment dated 18<sup>th</sup> January 2018 were irregular and must be set aside ex – debito justitiae - as a matter of law. This is because, although the defendants claim not to have been served with Summons to Enter Appearance, they were in fact served with such Summons but without the Plaintiff yet that is a mandatory requirement of the law. **Order 5 Rule 1(1) and (3) of the Civil Procedure Rules** provide as follows:-

***“1(1) When a suit has been filed a Summons shall issue to the defendant ordering him to appear within the time specified therein.***

***(2) —***

***(3) Every Summons shall be accompanied by a copy of the Plaintiff.”*** Emphasis added.

Although neither the Deputy Registrar nor the Counsel herein picked it up, it is clear from the affidavit of service dated 10<sup>th</sup> January 2017 that in fact the defendants were not served with a copy of the Plaintiff as is required by the mandatory provisions of the law. This is what CALEB SASITA a Process Server of this Court has deposed in paragraphs 1, 2, 5 and 6 of his Affidavit of Service:-

***1: “That I am a Process Server of the High Court of Kenya duly authorized by his Lordship the Chief Justice to effect civil process”***

***2: “That on 21<sup>st</sup> day of December 2016 I received Summons to Enter Appearance, Verifying Affidavit, list of documents, Plaintiff’s list of witnesses from the firm of RAGIRA GIDEON CO ADVOCATES with instructions to serve the same upon the defendant herein.”***

***5: “That upon arrival in the 1<sup>st</sup> defendant’s home I met the 1<sup>st</sup> defendant in person and after introducing myself and upon explaining to him my purpose of visit I served him with the said documents and acquiring (sic) his signature on the principal copy at 11:20 am. That he accepted service of the said documents but declined to sign on the principal copy herewith returned as duly served.”***

***6: “That on the same day I proceeded to the 2<sup>nd</sup> defendant’s home and being able to find him in person I served him with copies of the said documents at 11:32 am.”***

It is clear from the Process Server’s own Affidavit that the Plaintiff herein was not among the documents served on the defendants. And since an affidavit is defined in **BLACK’S LAW DICTIONARY 10<sup>th</sup> EDITION** as:-

***“A voluntary declaration of facts written down as sworn to by a declarant”***

this Court must conclude that, as a fact, the Process Server did not serve the defendants with the Plaintiff contrary to the mandatory provisions of **Order 5 Rule 1 of the Civil Procedure Rules**. The Process Server only served the Summons and other documents but without the Plaintiff. The Process Server may very well have served the defendants with the Plaintiff. However, this Court cannot add or deduct anything from his own Affidavit of Service because it is conclusive of the facts of what he did on 21<sup>st</sup> December 2016 when he served the defendants. And as is clear from the case of **JAMES KANYITA NDERITU** (supra), once the Court is satisfied of any irregularity in the manner that an ex – parte Judgment was obtained, it can even act **“on its own motion.”**

This Court cannot therefore close its eyes in the face of that glaring omission by the Process Server to comply with the provisions of the law. I don’t think it matters that the defendants may have subsequently obtained a copy of the Plaintiff when they learnt about the Judgment herein at execution stage. That is not how they were expected to be informed about the case facing them.

The up – shot of the above is that the defendant’s Notice of Motion dated 26<sup>th</sup> July 2018 is allowed. Costs shall be in the cause.

**Boaz N. Olao.**

**J U D G E**

**30<sup>th</sup> May 2019.**

Ruling dated, delivered and signed in Open Court at Bungoma this 30<sup>th</sup> day of May 2019.

Plaintiff present

Defendants absent

**Boaz N. Olao.**

**J U D G E**

**30<sup>th</sup> May 2019.**